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No. 04-989

IN THE

Supreme Court of the United States

SARAH JENKINS HORTON, ET AL.,

Petitioners,

v.

BANK ONE, N.A. ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS AND RESPONDENTS

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BRIEF OF AMERICAN BANKERS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS AND RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus Curiae American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States.[1] ABA has members in each of the fifty states and the District of Columbia, more than 1,000 of which are national banks. ABA member banks hold approximately 90% of the domestic assets of the banking industry in the United States. ABA frequently

[1] This brief is filed with the written consent of Petitioners and Respondents. Pursuant to Rule 37.6, counsel certifies that no counsel for any party authored this brief in whole or in part, and no person or entity, other than ABA and its members, made a monetary contribution to the preparation or submission of the brief.

appears in litigation as a party or amicus where the issues raised in a case are of widespread importance and concern to the industry. ABA is authorized to pursue its national-bank members' interests in being given access to federal courts that is equal to that provided to federal savings and loan institutions, state-chartered banks and other business corporations in general.

The issues raised in the petition urgently require this Court's review. The circuit conflict presented in this case is between the Fifth, Seventh and Ninth Circuits, which have properly recognized diversity jurisdiction for national banks,[2] and the Second and Fourth Circuits, which have adopted an approach to diversity jurisdiction that denies such jurisdiction to national banks in every state where they have retail banking offices.[3] As a result of this conflict, all ABA's national-bank members face uncertainty regarding their ability to invoke federal diversity jurisdiction in most of the state-law actions that are filed against them until this Court resolves that conflict. Accordingly, timely review and disposition of this action is warranted.

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[2] *Horton v. Bank One, N.A.*, 387 F.3d 426 (5th Cir. 2004) (Pet. App. 1a); *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001); *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943).

[3] *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 388 F.3d 414 (4th Cir. 2004); *World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154 (2d Cir. 2003).

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THERE IS NOW A CLEAR CIRCUIT CONFLICT THAT IS HAVING AN IMMEDIATE ADVERSE IMPACT ON NATIONAL BANKS.

As explained in the petition and the brief in response, there is now a clear circuit conflict between the Fifth, Seventh and Ninth Circuits on the one hand, and the Second and Fourth Circuits on the other, as to whether a national bank is "located," for purposes of 28 U.S.C. § 1348, wherever it maintains a branch.

In *Firstar Bank, N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001), the court held that a national bank is "located," for purposes of section 1348, only at the location listed in its organizational certificate or where it has its principal place of business. *Id.* at 993. Relying on decisions of this Court and other lower courts, as well as the history of section 1348, and Congress's policies in those statutes, the Seventh Circuit rejected the argument that a national bank is "located" wherever it maintains a branch. *Id.* at 987-93. In this case, the Fifth Circuit followed the Seventh Circuit in *Firstar* and carefully explained why national banks – in order to be treated in parity with all other financial institutions – are "located" for purposes of diversity jurisdiction only in the states where they have their principal place of business or have listed in their organizational certificate. *See* Pet. App. 5a, 9a. The Ninth Circuit, in a decision discussed below, pp. 10-11, construed a predecessor statute to section 1348 to conclude that a national bank was not "located," for purposes of the statute, in states where it only maintains branches. *American Surety Co. v. Bank of California*, 133 F.2d 160, 161-62 (9th Cir. 1943).

By contrast, the Fourth Circuit, in *Wachovia Bank, Nat'l Ass'n v. Schmidt*, 388 F.3d 414, 416 (4th Cir. 2004),

held that a national bank is "located," for purposes of section 1348, wherever it maintains a branch office, expressly rejecting the reasoning of the Seventh and Fifth Circuits, *id.* at 417-18. Because of multiple recusals, the Fourth Circuit denied en banc review of its decision even though six of the nine non-recused active judges favored such review. *See Wachovia, Nat'l Ass'n v. Schmidt*, No. 03-2061 (4th Cir.), Order of Feb. 10, 2005. The Second Circuit earlier came to the same conclusion as the Fourth Circuit, although with no explanation for its holding. *See World Trade Center Properties, L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 161 (2d Cir. 2003). Accordingly, there is now a complete and acknowledged conflict between the circuits on an important issue of federal law that warrants review by this Court.

The *Wachovia* ruling has already had, and will continue to have, a dramatic effect on the cases now pending in the federal courts in the Fourth Circuit. Since the Fourth Circuit issued its ruling, at least five pending actions have been remanded to state court.[4] The decision potentially may

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[4] *See, e.g., Wachovia*, 388 F.3d 414; *Coots v. Wachovia Securities, Inc.*, 114 Fed. Appx. 586 (4th Cir. Dec. 10, 2004); *National Union Fire Ins. Co. v. Manufacturers and Traders Trust Co.*, No. 03-2276 (4th Cir.) (Order of Jan. 28, 2005, dismissing First Union, N.A. as a dispensable, non-diverse party); *Friel Prosthetics, Inc. v. Bank of America, Nat'l Ass'n*, No. DKC 2004-3481 (D. Md. Feb. 9, 2005); *Stewart v. Bank of America, Nat'l Ass'n*, No. DKC 2004-2482 (D. Md. Feb. 9, 2005).

If the Court adopts the majority view that national banks are not "located," for purposes of section 1348, wherever they maintain a branch, then the parties to these and the other cases that will subsequently be remanded to state court will be deprived of a federal forum and will face increased litigation expenses and delay as a result of an ultimately correct, but nevertheless unsuccessful, removal effort. *See also infra* p. 6 (discussing 28 U.S.C. § 1447(c) & (d)).

also affect actions now pending in federal courts in other circuits, left uncertain by the multi-circuit conflict.

ABA national-bank members are adversely impacted by the continuation of the circuit conflict and the uncertainty it generates. For example, according to the FDIC's website (fdic.gov), member banks Bank of America, N.A., U.S. Bank, N.A., and Wells Fargo Bank, N.A. each maintain branches in more than 20 states, JPMorgan Chase, N.A. has branches in 17 states, Wachovia has branches in 13 states, and Keybank, N.A. has branches in 12 states. These and other national banks with multi-state branches are most likely to confront claims by disgruntled customers, suits on obligations and activities, and civil actions by and against insurers, in the states where they maintain branches. Under the Second and Fourth Circuits' view, these banks would not be permitted diversity jurisdiction access to federal courts in *any* state where they have a retail banking office.

By contrast, large interstate state banks like SouthTrust, Comerica and Compass Bank, to name just three, do not face a similar disadvantage.[5] For these banks' interstate branches, diversity jurisdiction would be governed by 28 U.S.C. § 1332(c)(1). For the purposes of establishing the citizenship of a corporation, that statute provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business...." As defendants, state banks could (assuming the requisite amount in controversy) establish federal diversity jurisdiction for purposes of removal in all of the states in which they do business, except where they are chartered or have their principal place of

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[5] According to the FDIC's website, fdic.gov, SouthTrust maintains branches in 9 states, while Comerica and Compass both maintain branches in at least 6 states.

business. As recognized by the Fifth Circuit in this case, this easily-demonstrated disparity "would lead to a narrow concept of 'parity'" between national and state charters with respect to access to federal courts directly contrary to the longstanding purposes of the National Bank Act that this Court has recognized. Pet. App. 13a. *See also infra* pp. 7-8.

Further, while the circuit conflict is unresolved, district courts may hesitate to invest time conducting extensive litigation proceedings in diversity actions involving national banks with branches in the jurisdiction. Indeed, such uncertainty could even lead district judges to remand actions to state court. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it *appears* that the district court lacks subject-matter jurisdiction, the case *shall be* remanded.") (emphasis added). And such remands cannot be appealed. *See id.* § 1447(d). This Court's prompt resolution of the issue presented in the petition is needed to provide jurisdictional certainty as to the many cases pending in, or yet to be filed or removed to, the lower federal courts. Prompt clarification in the law will allow both national banks and other litigants to plan for and conduct litigation under the correct understanding of diversity jurisdiction principles.

II. CONGRESS INTENDED NATIONAL BANKS TO BE ACCORDED THE SAME ACCESS TO FEDERAL COURTS AS OTHER STATE-CHARTERED CORPORATIONS AND BANKS.

A. Equal Access To Federal Court Is A Fundamental Part Of The National Banking Charter.

For more than a century, one of the fundamental tenets involving the statutory rights accorded by Congress to national banks is that these federally chartered institutions would be granted at least the same right of access to federal district court as are accorded to other state-charted corporations, and in particular, as other state-chartered banks.

Under the Second and Fourth Circuits' holdings, banks are to be deemed citizens of every state in which they have branches. By comparison, federal savings and loan institutions, state banks, and all other financial institutions with branches outside their chartering state are deemed to be citizens of at most two states. *See* 28 U.S.C. § 1332(c)(1). This Court should now decide whether banks chartered pursuant to the National Bank Act – uniquely among other business entities in this nation – cannot establish federal diversity jurisdiction in any state in which they have even a single retail banking office.

B. This Court Has Recognized The "Special Nature" Of National Banks.

This Court has long "recognized the special nature of federally chartered banks." *Beneficial National Bank v. Anderson*, 539 U.S. 1, 10 (2003). Not long after the National Bank Act was adopted in the early 1860s, this Court, in construing another provision of the Act, opined that "[n]ational banks have been [n]ational favorites." *Tiffany v. National Bank of Mo.*, 85 U.S. 409, 413 (1873). In doing so, the Court elaborated that:

> "[national banks] were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks. On the contrary, much has been done to insure their taking the place of State banks."

Id.

More recently, this Court has followed these early observations regarding the unique status that Congress accorded national banks in applying the National Bank Act. For example, this Court held that "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from possible unfriendly State legislation." *Beneficial*, 539 U.S. at 10 (internal citation and quotation marks omitted). Therefore, the Court found that the National Bank Act provides "the requisite pre-emptive force to provide removal jurisdiction" to federal court for usury claims against national banks. *Id.* at 11.[6]

This Court's review of this case to resolve the circuit conflict is warranted because the Second and Fourth Circuits' decisions are at odds with this Court's understanding of the "special nature" of national banks.

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[6] Similarly showing national banks' special status, in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996), this Court held that the normal rule that courts should apply a "presumption against preemption" is reversed in National Bank Act cases:

> "In using the word 'powers,' the [National Bank Act] chooses a legal concept that, in the context of national bank legislation has a history. That history is one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."

C. Resolution Of The Circuit Conflict Is Necessary To Restore The Well-Settled Understanding That National Banks Should Not Be Uniquely Disadvantaged In Their Access To Federal Courts.

Given the special role played by national banks, when Congress first authorized them in 1863, it extended the jurisdiction of the federal courts to include *all* suits involving a national bank. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 681. "For the first couple [of] decades of their existence, any suit involving a national bank could be brought in or removed to federal court since national banks are creatures of federal law and thus any suit by or against them was a suit arising under federal law." *Firstar Bank*, 253 F.3d at 986, citing *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644, 648 (1892); *Horton*, 387 F.3d at 430 (same), Pet. App. 6a.

In 1882, Congress eliminated automatic federal question jurisdiction over all disputes involving national banks. *See Leather Mfrs.' Nat'l Bank v. Cooper*, 120 U.S. 778, 780-81 (1887). In doing so, however, it expressly provided that jurisdiction over lawsuits involving national banks "shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States...." Act of July 12, 1882, ch. 290, 22 Stat. 162, 163.

This Court promptly construed the 1882 amendment to place "national banks on the same footing as the banks of the state where they were located for all the purposes of the jurisdiction of the courts of the United States." *Leather Mfrs.' Nat'l Bank*, 120 U.S. at 780; *see also Petri*, 142 U.S. at 649 (observing that 1882 amendment "placed [national banks] in the same category with banks not organized under the laws of the United States"); *Firstar Bank*, 253 F.3d at 986; *Horton*, 387 F.3d at 430, Pet. App. 7a-8a.

In 1887, Congress again revised the jurisdictional statute, introducing the language at issue in this case. *See* Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 554 (providing that "all national banking associations ... shall ... be deemed citizens of the States in which they are respectively located"). When interpreting this statutory revision, this Court again recognized the clear intent of Congress that national banks be accorded equal access to the federal courts. *See Petri*, 142 U.S. at 650-51 ("No reason is perceived why it should be held that congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might."); *Horton*, 387 F.3d at 432-33, Pet. App. 11a; *Fin. Software Sys., Inc. v. First Union Nat'l Bank*, 84 F. Supp. 2d 594, 600 (E.D. Pa. 1999) (recognizing that the 1887 Act changed the structure of the 1882 enactment, but it "did not change the purpose").

Indeed, the 1887 Act expressly stated that Congress intended to put national banks on at least as good a footing as individuals and state-chartered institutions with respect to access to federal courts: "[I]n such cases [involving national banks,] the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State." Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, 554-55.

In 1911, Congress dropped the language just quoted and adopted language nearly identical to the current section 1348: "[A]ll national banking associations established under the laws of the United States shall, for the purposes of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located." Act of Mar. 3, 1911, ch. 231, § 24, ¶ 16, 36 Stat. 1087, 1092-93.

At the time, most national banks – like state banks – had offices in only one state. However, some had established interstate branches. One of those banks, the Bank of

California, had branches in Oregon in addition to its main office in California. In a diversity action brought against the bank in Oregon, the Ninth Circuit affirmed the district court's conclusion that

> "a logical interpretation of the phraseology of [the 1911 Act language] leads to the conclusion that the 'States in which they (national banking associations) are respectively located' are those states in which their principal places of business are maintained. If the Congress had intended to provide that a national banking institution be given the privilege and should carry the duties of citizenship in various states upon the basis of branch business offices being established therein, it would be a noteworthy departure from the general rule, and more likely than not Congress would have plainly state[d] such intent."

American Surety Co. v. Bank of California, 133 F.2d 160, 162 (9th Cir. 1943).

Congress responded to this authoritative judicial construction of the "located" language – and call for a "plain statement" from Congress if the rule was intended to be otherwise – five years later, in 1948. At that time, the national bank jurisdictional statute was re-codified as the present 28 U.S.C. § 1348, and Congress left intact the provision of the statute relied upon by the Ninth Circuit deeming national banks to be "citizens of the States in which they are respectively located" – *i.e.*, the state of their principal place of business.

When Congress amended the National Bank Act in the 1994 Reigle-Neal Act, Pub. L. No. 103-328, Title I, 108 Stat. 2338, 2349, 2352, which relaxed prior barriers to interstate branching by both national and state banks, *see id.* (amending, *inter alia*, 12 U.S.C. §§ 36 & 1842(d)), and made it possible for all national banks to have branches nationwide, it again left in place the same statutory language of section 1348, backed up by the same settled judicial construction regarding the citizenship of a national bank.

After Congress's adoption of Reigle-Neal in 1994, the pace of national and state banks' interstate branching activities increased dramatically. National banks now have over 16,000 interstate branches, while state banks have slightly less than 6,000 interstate branches.[7]

A statute's longstanding meaning forms the background against which Congress legislates when it amends the law. Courts presume that Congress will use clear language if it intends to alter an established understanding about what a law means: if Congress fails to do so, courts presume that the new statute has the same effect as the older version. *Firstar Bank*, 253 F.3d at 988, citing *Cottage Savings Association v. Commissioner*, 499 U.S. 554, 562 (1991). Moreover, if a phrase or section of a law is clarified through judicial construction, and the law is amended, but retains that same phrase or section, then Congress presumably intended for the language in the new law to have the same meaning as the old. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *Firstar Bank*, 253 F.3d at 988.

Applying these interpretive principles here, Congress recodified section 1348 in 1948 in light of the settled

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[7] *See* http://csbs.org/info_stats/StateBankingStats.pdf (p.11) (Sept. 31, 2003).

interpretation and operation of the statute which had recently been reaffirmed by the Ninth Circuit's 1943 *American Surety* decision discussed above, pp. 10-11. The settled understanding that Congress adopted in 1948 was that the 1882 amendments to the National Bank Act, as carried over in the 1887 and 1911 Acts, placed national banks in the same position regarding federal jurisdiction as all other corporations. *Petri*, 142 U.S. at 650-51; *Leather Mfrs.' National Bank*, 120 U.S. at 780. *See Mercantile National Bank v. Langdeau*, 371 U.S. 555, 565-66 (1963) ("Section 4 [of the 1882 and 1887 amendments] apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited."). After 1994, when interstate branching by national banks became widespread, Congress maintained this longstanding legal institution of parity between state and national banks with respect to federal court jurisdiction.

Because the Second and Fourth Circuits' decisions upset this well-settled understanding of section 1348 – and in the process create uncertainty regarding national banks' access to federal courts – this Court's prompt resolution of the circuit conflict is warranted.

III. THIS COURT SHOULD GRANT REVIEW BECAUSE THE SECOND AND FOURTH CIRCUITS' DECISIONS ARE INCONSISTENT WITH THE NATIONAL BANK ACT.

The National Bank Act provides for the formation of national banking associations. Organizers adopt articles of association, 12 U.S.C. § 21, and create an "organization certificate," 12 U.S.C. § 22, which is sent to the chartering authority, the Office of the Comptroller of the Currency.

The organization certificate must identify the physical location of the association. The certificate shall "specifically state" the "place where its operations of discount and deposit

are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village." 12 U.S.C. § 22(Second). Clearly, under section 22(Second), a "national association" is deemed to have one "location." *See also Firstar Bank*, 253 F.3d at 993-94 (discussing § 22(Second)). By concluding that national banks are "located" wherever they maintain a branch, the Second and Fourth Circuits' decisions conflict with 12 U.S.C. § 22(Second).

The Second and Fourth Circuits' decisions also overlook the fact that a "national banking association" has a legal existence that is distinct and separate from its branches. Congress dealt with the mechanism for establishing and situating branches in an entirely different fashion in the National Bank Act. *See* 12 U.S.C. § 36. The authority for a national association to create branches is separate and apart from the provisions relating to the creation of the bank itself as a national association.[8]

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[8] Congress's distinction between a national association, referred to in statutes like 12 U.S.C. § 22(Second) and 28 U.S.C. § 1348, as opposed to national bank "branches," is also reflected in 12 U.S.C. § 36(f)(2): "All laws of a host State, other than the laws regarding community reinvestment, consumer protection, fair lending, establishment of intrastate branches, and the application or administration of any tax or method of taxation, shall apply to a branch (in such State) of an out-of-State national bank to the same extent as such laws would apply if the branch were a national bank the main office of which is in such State."

Congress's direction that a "branch" shall receive the same treatment as a "national bank" under the laws of the host state is significant because it provides further congressional recognition that a "national bank" and its branches are not coextensive, and represent separate and distinct legal entities for purposes of the National Bank Act and therefore also the jurisdictional statute. If a "national bank" and a "branch" were in fact legally indistinguishable from one another, then 12 U.S.C. § 36(f)(2) would be mere surplussage.

Accordingly, this Court should grant review to harmonize the provisions of the National Bank Act with the jurisdictional provision in section 1348, in light of the conflicting decisions of the circuit courts.

CONCLUSION

For the foregoing reasons, as well as for those set forth in the petition and the brief in response, the petition should be granted.

Respectfully submitted,

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